MEMORANDUM OF LAW

DATE: September 2, 1994

TO: Jerry Sanders, Chief of Police

FROM: City Attorney

SUBJECT: Preparation of Response to Equal Employment Opportunity Commission's Investigation Into Complaint

BACKGROUND

Following the receipt of a complaint, the federal Equal Employment Opportunity Commission (EEOC) has begun an investigation into alleged sexual harassment and retaliation in the Police Department. Pursuant to its usual practice, the EEOC has requested that the respondent in the complaint, in this case the City, respond to the allegations of the complaint and provide certain other information about the personnel involved. The City's Equal Employment Investigative Officer (EEIO), Margaret Watson, has, in turn, requested that the Police Department provide information that will allow the City to respond to the EEOC's request. The request for a response was in a standard format used by the EEOC in similar cases and which listed specific allegations for which a response was requested.

This office initially expressed serious reservations about disclosing the requested information to the EEIO and opined that the disclosure of "compelled"F

"Compelled" is used as a term of art in internal police investigations.

information to the EEOC might violate the following: (1) Penal Code Section 832.7 (confidentiality of personnel records); (2) Art. 41 of the Memorandum of Understanding ("MOU") between the City of San Diego (the "City") and San Diego Police Officer's Association ("POA") (Officer's Rights--Pitchess procedures); and (3) Government Code Sections 3300-3311 (Public Safety Officer's Procedural Bill of Rights Act (the "Act")).F

See, Confidential Memorandum from John Vanderslice to Chief Sanders dated July 8, 1994.

By memorandum dated August 30, 1994, you indicated to the Personnel Director that you were concerned about the legal implications of releasing information to outside agencies. You also indicated, however, that the Police Department was prepared to

release the information if this office confirmed that such information may be lawfully released.

Subsequent review of this matter leads to a conclusion that the Police Department should respond to the EEIO request for information and that such information may be used to respond to the EEOC without regard to state law privileges. Such disclosure does not violate any applicable confidentiality or procedural safeguards. If the gathered information is to be used for the purpose of discipline, however, the procedural provisions of the Act and MOU must be followed.

ANALYSIS

I

SCOPE OF PRIVILEGES AND STATUTORY SAFEGUARDS

An understanding of the scope and purpose of Penal Code Section 832.7, the MOU and the Act are necessary to resolve the questions raised by the EEOC's investigation. Penal Code Section 832.7 is a privilege held by the City not to disclose certain information in a criminal or civil proceeding unless certain procedures are followed. See generally, Bradshaw v. City of Los Angeles, 221 Cal.App.3d 908, 915-922 (1990), rev. denied. That section is not applicable to internal investigations by the City itself.F

As explained in Part II below, that section is also not applicable to the EEOC's investigatory authority.

Id.

The provisions of the MOU and the Act also do not affect the disclosure of information gathered as a result of an internal investigation. As is more fully explained in a previous Opinion by this office, those matters provide procedural protection for officers under investigation if the information gathered is to be used by the City for disciplinary purposes. See, Opinion No. 87-1 (enclosed hereto as Attachment No. 1) at pages 8, 13-16. Neither the MOU nor the Act prohibit disclosure of information.

II

THE REQUESTED INFORMATION MAY BE DISCLOSED TO THE EEOC WITHOUT REGARD TO, AND WITHOUT VIOLATING, ANY STATE LAW PRIVILEGES

A. EEOC Investigative Authority

The creation, power and scope of authority of the EEOC are set forth in 42 U.S.C. Sections 2000e et seq. Section 2000e-8 speaks to the issues of inspection and access to records and provides, in relevant part:

> (a) Access to evidence. In connection with any investigation of a charge filed under section 706 ┌42 USCS Section 2000e-5σ, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of

> examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this title ┌42 USCS Sections 2000e et seq.σ and is relevant to the charge under investigation.

42 U.S.C. Section 2000e-8(a).

This broad authority to investigate has been interpreted expansively by the courts to include EEOC authority to require the production of any evidence relevant to the charge of employment discrimination and includes "the production of any evidence in his ┌the respondent'sσ possession or under his control, ┌citationσ. We ┌the courtσ believe that this language includes the authority to require the respondent to compile evidence that is not in documentary form." E.E.O.C. v. Maryland CUP Corp., 785 F.2d 471, 478 (4th Cir. 1986), cert. denied, 479 U.S. 815 (1986)(emphasis in original). The court further explained:

> The fact that the information sought exists in the minds of the supervisors and workers, not in the minds of its senior managers, does not absolve the company from seeking out that information. To the contrary, all relevant information within the company's control is subject to the EEOC's subpoena power.

Id. at 479.

Accordingly, the EEOC is entitled to any evidence a department may uncover through investigation, not just presently existing documentary evidence. Id. at 478.

Moreover, the only limitation on the EEOC's authority to access records of an employer under 42 U.S.C. Section 2000e-8(a) is that the evidence be relevant to the charge under investigation. Id. at 475-476. See also, E.E.O.C. v. Shell Oil Co., 466 U.S. 54, 68-69 (1984). Significantly, the court in Shell Oil noted that the "relevancy limitation" on the EEOC's investigative authority is not especially constraining. Id., at 68. "Courts have generously construed the term `relevant' and have afforded the Commission access to virtually any material that might cast light on the allegations against the employer." Id. at 69 (citations omitted). Accord, Equal Employment Opportunity Commission v. Cambridge Tile Mfg. Co., 590 F.2d 205, 206 (6th Cir. 1979) (recognizing that the scope of relevancy at the investigatory stage is very broad in actions under 42 USCS Section 2000e-5).

The present situation involves an EEOC investigation into the alleged sexual harassment and retaliation. Pursuant to this investigation, the City's EEIO has requested responses to certain questions posed by the EEOC. Based on the EEOC's broad authority to

compel disclosure of the information, as explained above, any evidence relating to the sexual harassment charge at issue is discoverable, subject only to the very broad relevancy limitation.

To successfully resist EEOC discovery efforts, the police department would bear the burden of establishing the facts on which their asserted privileges depend. Burke v. New York City Police Department, 115 F.R.D. 220, 224 (S.D.N.Y. 1987). "Similarly, to the extent that they ┌the police departmentσ rely upon a claim of lack of relevance, they must satisfy the court that the requested documents either do not come within the broad scope of relevance . . . or else are of such marginal relevance that the potential harm occasioned by disclosure would outweigh the ordinary presumption in favor of broad disclosure." Id.

Consequently, the EEOC's investigatory efforts in the instant situation are well within their express statutory authority and any challenges based on relevancy will likely fail given the court's expansive interpretation of "relevant."

B. Conflicts with state law

Generally speaking, state law does not govern discoverability and confidentiality in federal civil rights actions within the state. King v. Conde, 121 F.R.D. 180, 187 (E.D.N.Y. 1988). It is well settled that questions of privilege in federal civil rights cases are governed by federal law. Id.; See also, Burke, 115 F.R.D. at 225 (explaining that state-law privileges do not directly apply to an action premised upon federal law claims).

The question raised in this matter is whether California's confidentiality laws relating to peace officer records provide a sufficient basis for declining to comply with the EEOC's request for a response to the complaint. The issue was resolved by the court in E.E.O.C. v. County of San Benito, 818 F.Supp. 289 (N.D. Cal. 1993). There, the E.E.O.C. sought enforcement of three subpoenas requiring the County of San Benito to produce documents relevant to the Commission's investigation of three charges of sex discrimination and retaliation filed against the county by three complainants including two Deputy Sheriffs. The County of San Benito failed to comply with the E.E.O.C.'s request for production of documents on grounds that Penal Code Section 832.7 requires the County to refuse to disclose to the Commission a peace officer's personnel records and information obtained from those records. Id. at 290. The court held that "California's confidentiality laws relating to peace officers do not provide a basis for declining to comply with the Commission's subpoenas. The courts have decided that the federal Equal Employment Opportunity Commission's mandates preempt state restrictions." Id. at 291. Accordingly, the state confidentiality and privilege laws do not prohibit disclosure of the requested information to the EEOC. The San Benito case concerned the

issuance of subpoenas, however, subpoenas are not automatically issued by the EEOC. The EEOC will issue subpoenas as a last resort, preferring to use less costly and time-consuming, voluntary methods to obtain information whenever possible pursuant to EEO Compliance Manual Section 24.1(a). The important point is that the state law privileges do not prohibit disclosure of the requested information to the EEOC. Disclosure of confidential material by one public official to another public official, authorized by law to receive the material, is not a "public disclosure." Parrot v. Rogers, 103 Cal.App.3d 377, 382-383 (1980). Here, the EEOC is authorized by law to receive the requested information and disclosure to it does not run afoul of any state law privileges.

III

THE POLICE DEPARTMENT SHOULD PROVIDE THE REQUESTED INFORMATION TO THE PERSONNEL DEPARTMENT

As previously indicated, the City's EEIO submitted a written request for information to the Department. The EEIO is employed in the Personnel Department and is supervised by the Personnel Director. City Charter section 37 provides, in relevant part, that the Personnel Director "shall, . . . on his own initiative, investigate problems relating to . . . any and all other matters relating to this ┌the Personnelσ department as may properly come before him." In addition, Charter section 128 provides, in relevant part, that:

> ┌Tσhe Personnel Director or any persons designated by ┌himσ, may make investigations concerning the facts in respect to the operation and enforcement of the Civil Service provisions of the Charter and of the rules established thereunder, and concerning the conditions of the Civil Service of the City or any branch thereof. . . . Any person . . . making an investigation authorized . . . by this Section, shall have power to subpoena and require the attendance of witnesses and the production of books and papers pertinent to the investigation."

Finally, Municipal Code section 23.1702 requires the Personnel Director to investigate all discrimination complaints.

The EEIO, therefore, is invested with broad investigatory authority concerning the circumstances surrounding the EEOC complaint.F

It should also be noted that, pursuant to Charter section 40, the City Attorney may compel the production of any evidence necessary for the legal defense of the City, as in a case such as this.

Indeed,

the City is the formal "respondent" to the EEOC complaint and it is the manifest intent of the electorate, expressed in the Charter, and the Council, expressed in the Municipal Code, that the Personnel Department have access to all relevant information from any City department when investigating such matters even if only to respond to a federal investigation. Disclosure of that information from one department to the other under these circumstances does not violate any state law privileges. Bradshaw, 221 Cal.App.3d at 915-922; Parrot, 103 Cal.App.3d at 382-383. It is thus entirely appropriate and lawful for the Police Department to cooperate with the EEIO in this case. The only qualification to the EEIO's authority is that, as noted in Part I of this Memorandum, if it is anticipated that discipline may be imposed following any investigation, the procedural safeguards set forth in the Act and MOU must be followed.

CONCLUSION

The Police Department should cooperate with the EEIO concerning the request for information in this matter. The City is the responding party to the complaint. The Personnel Department may lawfully have access to Police Department information relevant to the complaint and may properly use such information in responding to the EEOC without running afoul of any state privileges. Procedural safeguards must be followed if it is anticipated that the gathered information may be used for disciplinary purposes.

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PAM:SAM:LJG:pev(x043.2)
Attachment
cc: Rich Snapper, Personnel Director
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ML-94-74